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The Madras Law Journal.

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ALIENATION BY A MANAGER FOR THE 'BENEFIT OF THE ESTATE.'

Referring to the principle laid down in the case of *Hunooman Persaud Panday* v. *Mussumat Babooee Munraj Koonweree* [1] that the power of alienation possessed by the manager for an infant heir in respect of the property of the latter "can only be exercised rightly in a case of need or for the benefit of the estate," Sir Ernest Trevelyan in his work on 'Hindu Law' (p. 274) observes: "Apart from necessity, it is not easy to say what is for the benefit of the estate. It is clearly not intended that this power should authorise a sale or charge for the purpose only of increasing the immediate income of the estate." The correctness of this opinion was considered by the late Mr. Justice Sundara Aiyar in *In re Krishnaswami Doss Reddi* [2] and in *Vembu Iyer* v. *Srinivasa Iyengar* [3] and by Mookerjee and Newbould, JJ., in *Krishna Chandra Chowdhury* v. *Ratan Ram Pal* [4]. The learned Judges were of opinion that in the case in 6 Moore the Privy Council drew a distinction between a case of need and a case of benefit to the estate; that the expressions 'necessity' and 'benefit' really imported two different ideas; and that the rule in 6 Moore was not restricted to cases of necessity, but included cases of alienations which would conduce positively to the benefit of the minor or of his estate, though they were not for 'necessity.' According to them, the test of the validity of an alienation in such cases was to see whether it was *a proper and reasonable act* instead of whether it was *necessary*. In *Vembu Iyer* v. *Srinivasa Iyengar* [3] Mr. Justice Sundara Aiyar described the term 'necessity' as 'the warding off an evil or the doing of something that cannot be avoided or of something which it is one's legal duty to do,' and, after instancing acts which would be considered to be necessary in this sense, observed: "But, over

1. (1856) 6 M. I. A. 393.
2. (1912) M. W. N. 167.
3. (1912) 23 M. L. J. 638.
4. (1915-6) 20 C. W. N. 645.

and above all these acts that are necessary, there may be acts which are positively beneficial to the minor, and an alienation which would conduce positively to the benefit of the minor would be upheld apart from any necessity unless of course it is accompanied by other evil." In the Calcutta case the learned Judges further held that the rule in 6 Moore did not include cases of speculative developments of estates of minors and that mere increase in the immediate income of the minor or of his estate would not necessarily justify the inference that the particular transaction was for the benefit of the estate within the meaning of the rule. Some observations of the Judicial Committee in the recent case of *K. P.L.S. Palaniappa Chetty* v. *Sreemath Deivasikamony Pandara Sannadhi alias Nataraja Desikar* [1] may be interpreted as supporting the view of Sir Ernest Trevelyan and as being inconsistent with the opinions of Sundara Aiyar, J., and of Mookerjee and Newbould, JJ., in the cases referred to above. It is therefore desirable to examine the case with a view to see whether it has really any, and, if so, what bearing on the question. The precise question for decision by their Lordships was as to the validity of a permanent lease by the trustee of a temple of a building site belonging to it. At the time the lease was granted, no rent was received out of the site, there being some ruins on it. The ruins had become a nuisance which could not be abated except at a considerable cost. The grant of the lease was, however, an easy and convenient way of getting it abated. The trustee for the time being acting, therefore, in what he honestly believed to be the best interests of the temple, granted the lease in consideration of a nuzzer or a premium. There was, however, no 'necessity' constraining the trustee to grant the lease, though the effect of his doing so was to increase the income of the temple. The alienation could therefore be supported, and was really sought to be supported, only on the ground of its being for the benefit of the temple, the benefit, however, consisting solely in the fact that the income of the temple was increased. There was no suggestion either in the Courts below or before their Lordships that the alienation was made with a view to procure other and more profitable immoveable property for the temple or that other immoveable property was as a matter of fact purchased for it. On the facts, therefore, the alienation, the validity of which was considered by

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1. (1917) 33 M. L. J. 1.

their Lordships, was one made for the purpose, and having the effect, of converting immoveable property into cash, though the transaction had also the effect of increasing the income of the estate of the temple. They were not called upon to consider, and did not consider, the validity of an alienation which, without causing loss to the corpus of the estate itself in any way, will certainly increase its income. Alienations made merely for the purpose of converting immoveable property into cash have always been held to be invalid and for obvious reasons. The significance of their Lordships' judgment seems to lie in the fact that they declined to uphold an alienation made for such a purpose even though it was made under the exceptional circumstances referred to above and had the effect of increasing the income of the temple. That this alone was the point decided by their Lordships will be abundantly clear from the following passages in their judgment : "But attractive and lucrative as money-lending business may be in British India, it is needless to point out that a *shebait* would not be justified in selling *debutter* land *solely for the purpose of getting capital to embark in the money-lending business.* And no authority has been cited giving any countenance to the notion that a *shebait* is entitled to sell *debutter* land *solely for the purpose of so investing the price of it as to bring in an income larger than that derived from the probably safer and certainly more stable property, the debutter land itself.*" (The Italics are ours).

There is however one passage in their Lordships' judgment which may appear to be inconsistent with the above interpretation of it. Instancing the purposes which 'would obviously be benefits' they observe : "The preservation, however, of the estate from extinction, the defence against hostile litigation affecting it, the protection of it or portions from injury or deterioration by inundation, these and *such like things* would obviously be benefits.' (The italics are ours). The objects thus specified may reasonably fall under the category of 'necessity' being 'in the nature of salvage expenditure,' and from the addition of the expression 'such like things' it may, on a theory of '*ejusdem generis*,' be suggested that their Lordships have obliterated the distinction between 'necessity' and 'benefit' and that the effect of the judgment is to recognise only alienations for 'necessity'. Construed strictly and without due regard to the context, the passage does lend color to the above contention ; but we venture to think that for

several reasons this will not be a correct understanding of the judgment. In addition to the circumstance that, as we have endeavoured to explain above, the judgment does not deal with the point now under consideration, the following considerations seem to support our conclusion: If the view of their Lordships really was that 'necessity' and 'benefit' form only one category and that an alienation by a manager would be valid only if it was for 'necessity' they might easily have expressed themselves to that effect and need not have elaborately considered the import of the expression 'benefit to the estate' as distinguished from 'necessity'. That they have considered the two heads separately will clearly appear from the following passages in their judgment: "It is necessary in order to ascertain the sense in which such general and elastic terms as 'necessity' and 'benefit of the estate' were used in these authorities to examine the facts in reference to which the terms were used;" "so much for the 'benefit of the estate' of the charity alleged to result from this transaction. Next as to the imperative necessity constraining the *shebait* to enter into it:" "In their Lordships' view the evidence does not establish that the *shebait* was constrained by any necessity (as that term is in such a connection understood) to make this grant, or that any benefit accrued to the charity estate from the making of it." Again it must be remembered that their Lordships themselves recognise the impossibility of giving a precise definition of the expression 'benefit to the estate' applicable to all cases and the difficulty in drawing the line as to what are, in this connection, to be taken as benefits and what not. Lastly, their Lordships themselves expressly state that they do not attempt to give an exhaustive definition or description of the term 'benefit to the estate.'

On principle it is difficult to see why an alienation, which, without causing loss to the corpus of the estate itself in any way, is beyond doubt a reasonable one and is for the manifest benefit of the estate in that it increases its income, should be held invalid merely because it was not 'necessary.' Let us take a case of fairly frequent occurrence in this Presidency. Part of the estate of a minor may consist of waste lands obtained on *darkhast* and requiring the expenditure of a large sum of money for their reclamation. The minor may not have any cash and his other properties may be such as to make their alienation improvident. The waste lands themselves may not be capable of yielding any

income until reclaimed while they may be a burden on the estate till then by reason of the kist due therefor having to be paid out of the income from the remainder of the estate. Their alienation may however not be necessary in the sense that if they are not so alienated the whole or a portion of the remainder of the corpus of the estate will be lost to the minor. Supposing in such a case his guardian sells the waste lands and buys other lands in the same village or elsewhere, the transaction having the effect of increasing the income of the estate without causing loss to its corpus in any way. It will, it seems to us, be going too far to hold that even such an alienation is invalid, and, as we have endeavoured to point out, there is nothing in the recent judgment of the judicial committee obliging the Courts to hold that it is invalid.

No doubt, as Sundaraiyar, J., pointed out in *In re Krishnasamy Doss Reddi* [1] referred to above, the alienee in the class of cases suggested would have a very heavy onus to discharge in showing that an alienation for some reason *other than necessity* was nevertheless a reasonable one beyond doubt and the propriety and reasonableness of the alienation would have to be judged by the courts without ignoring the fact that it is an absolute sale of the minor's property. But once the conclusion is reached that the particular alienation is for the manifest 'benefit of the estate,' it must, we venture to think, as a rule of law, be held to be valid, though not supported by 'necessity.' In this view an exchange by the manager of the property of an infant for property of third parties will also be valid if for the 'benefit of the estate.'

One other point in this connection may be briefly noticed here. The test of the validity of an alienation by persons in the position of the manager for an infant heir has sometimes been held to be (*see Krishna Chandra Chowdhury* v. *Ratan Ram Pal* [2] already referred to) whether the particular alienation was such as a prudent owner might have made in respect of his own estate. For the reasons given at some length by Sundaraiyar, J., in *Vembu Iyer* v. *Srinivasa Iyengar* [3], we venture to think that the true test is rather whether the alienation in question would be regarded as a prudent act by men of ordinary prudence in dealing with the property of a ward.

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1. (1912) M. W. N. 167. 2. (1915-16) 20 C. W. N. 645.
3. (1912) 23 M. L. J. 638.

SUMMARY OF ENGLISH CASES.

Taff Vale Railway Company *v.* **Bardiff Railway Company**: (1917) 1 Ch. 299 C. A.

Legislature—Right to confer rights not previously known to law.

Dissenting from the dictum of Kay, L. J., in *Metropolitan Ry. Co.* v. *Fowler*, [(1892) 1 Q. B. 165 at 183] that "Even an Act of Parliament cannot make a freehold estate in land an easement, any more than it could make two plus two five", Scrutton, L. J., held in this case that Parliament could confer certain rights not previously known to the law, and could call them by what names it pleased, however previously inappropriate.

Hill *v.* **Settle**:—(1917) 1 Ch. 319 C. A.

Bankruptcy—After-acquired property of bankrupt—Rights in, of trustee and of bankrupt—Intervention by trustee—Effect—Withdrawal of intention—No revesting of property in bankrupt.

Property acquired by a bankrupt, including rights of action under contracts subsequent to the date of the order of adjudication (after the commencement of the bankruptcy), is vested in the trustee. But until he intervenes, all transactions by the bankrupt after his bankruptcy with any person dealing with him *bona fide* and for value, in respect of his after-acquired property, whether with or without knowledge of the bankruptcy, are valid against the trustee. From the moment, however, the trustee intervenes, the property vests in him (the trustee) absolutely, and can no longer be recovered by or dealt with by the bankrupt.

Held, in the case of a chose in action, that the effect of the intervention by the trustee was to vest in the trustee in bankruptcy the right of action which previously was vested in the bankrupt himself and that the trustee could not subsequently withdraw his intervention and so divest the property from himself and revest it in the bankrupt.

The withdrawal by the trustee of the notice of intervention cannot operate as a revesting of the property in the bankrupt.

In re **Fletcher: Reading v. Fletcher**: (1917) 1 Ch. 339 C.A

Merger—Intention—Presumption—Declaration of intention subsequent to date of alleged merger—Admissibility in evidence

An intention not to merge by the person acquiring the outstanding estate will prevent merger and will preserve the two estates as separate interests in the property. The intention not to merge will be presumed when it can be shown that it is either the duty or the interest of that person that there should be no merger. In these cases an intention to do his duty or to take the course which is most in his interest is presumed, but evidence of intention is not restricted to these cases; intention is a question of fact, and like any other question of fact, it can be proved by any admissible evidence.

Held that a declaration of what was the intention at the date of the alleged merger made at a subsequent time would be admissible in evidence, though its weight might be slight.

Alderdale Estate Company *v.* **Mc. Grory**: (1917) 1 Ch. 414 C. A.

Vendor and purchaser—Open contract for purchase of land—Decree for specific performance—Inquiry as to title directed by decree—Purchaser's objections to title—Vendor's right to adduce evidence after decree of purchaser's knowledge of incurable defects.

An open contract is a contract not containing any express provision that a good title shall be made by the vendor. But it is an implied term of such a contract that a good title shall be furnished and it is open to the vendor to prove that the purchaser bought with notice (though given by word of mouth only) that a good title could not be made, either wholly or partially. *Held* that, upon an inquiry as to title under an ordinary decree for specific performance of an open contract to purchase land, it was open to the vendor to adduce evidence to show that the purchaser when he entered into the contract, knew of the existence of incurable defects in the title. The point as to the purchaser's knowledge need not necessarily be raised in the statement of claim itself.

Holgate *v.* Bleazard (1917) 1 K. B. 443.

Trespass—Fletcher v. *Rylands—General rule of law under —Exception in case where damage due to 'default' of plaintiff— Plaintiff tenant under a lease with covenant to repair fence— Breach of covenant—Liability of owner of cattle if excluded by virtue of—Possibility of avoidance of damage if plaintiff had not broken covenant—Effect—Distinction between cases where plaintiff is under statutory obligation or obligation created by deed and one in which only obligation is between him and his landlord.*

Under the ruling in *Fletcher* v. *Rylands*, the general rule of law is that the owner of cattle is bound to take care that they do not trespass on the land of others and that if they do trespass and cause loss to the neighbour, their owner must make good the damage which ensues. The case where the plaintiff has been damnified by the trespass *but by his own fault* is an exception to the general rule. *Held*, that the mere fact that the plaintiff was under a covenant with his landlord to keep in repair the fence on his land was not sufficient to bring the case within the exception of the escape being due to the 'default' of the plaintiff and that there was a clear distinction between cases where there was a statutory obligation or an obligation by deed to maintain a fence which would exclude cattle or prevent them from trespassing and a case where the only obligation on the part of the plaintiff was an obligation between him and his landlord to keep in repair the existing offence.

Cohen *v.* Popular Restaurants, Ltd.: (1917) 1 K. B. 480.

Lease—Covenant not to assign without consent of lessor— Lessee a company—Voluntary liquidation of company—Assignment by liquidator without lessor's consent if a breach of covenant —Distinction between case of compulsory winding up and one of Voluntary winding up—Distinction between case in which there is adjudication and one in which there is none.—Action for damages for breach of covenant—Lessor electing to avoid lease— Measure of damages.

A covenant in a lease by the lessee not to assign the demised premises without the lessor's previous license and consent in writing not to be unreasonably withheld in case of a respectable and responsible person being offered as a tenant does not extend

to prohibit an assignment by a person who takes the lease by operation of law together with a duty to dispose of it. A liquidator brought into existence by the voluntary act of a company, the passing of a special resolution to wind up the company voluntarily, is not such a person. Where therefore a company, who were lessees under a lease with a covenant not to assign as stated above, went into voluntary liquidation and the liquidator without the license or consent in writing of the lessor assigned the lease without offering a responsible person as tenant, *held* that (1) there was a breach of the covenant and (2) in an action for damages for breach of the covenant, the lessors electing to avoid the lease, they were entitled to assess their damages once for all in a single sum such as will put them in the same position as if they had still the company's liability instead of the liability of the person to whom the lease was assigned.

Distinction on the first point between a case of compulsory winding up of a company and a case of voluntary winding up and between a case where there is an adjudication and one in which there is none.

Rex *v.* Kensington Income-Tax Commissioners; Ex parte Princess Edmond De Polignal: (1917) 1 K. B. 486 C. A.

Ex parte *application — Applicant's duty with regard to disclosure of material facts—Rule requiring* uberrima fides—*Scope and applicability—Writ of prohibition.*

A person who makes an *ex parte* application to the Court is under an obligation to the Court to make the fullest possible disclosure of all material facts within his knowledge, and if he does not make the fullest possible disclosure, then he cannot obtain any advantage from the proceedings, and he will be deprived of any advantage he may have already obtained by means of the order which has thus wrongly been obtained by him. This rule is not limited to cases where an injunction has been granted and applies to the case of an application for a rule *nisi* for a writ of prohibition.

Scope of the rule discussed.

Westcott *v.* Hahn: (1917) 1 K. B. 605.

Lease—Covenant—What constitutes—Covenant by lessee to repair "being allowed all necessary materials" for repair by

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essor—Construction—Covenant by lessor and qualification of covenant of lessee—Distinction—Custom by which lessor should provide lessee with materials—Evidence of—Admissibility when inconsistent with lease.

The decision in this case depended upon the construction of a clause in an indenture of lease of a farm-house by which the lessee covenanted to repair and maintain the farm-house during the period of the lease "being allowed all necessary materials for this purpose (to be previously approved in writing by the lessor)." The question was whether the words "being allowed . . . by the lessor" were merely a condition precedent to the lessor's right to demande xecution of the repairs by the tenant, or implied a covenant to allow the said materials when the premises being out of repair, the lessee desired to do the repairs, a covenant for the non-fulfilment whereof the lessee would be entitled to damages from the lessor. *Held* by Viscount Reading, C. J., Ridley, J., and Lord Coleridge, J. dissenting that the proviso was not a covenant on the part of the lessor but was only a qualification of the covenant of the lessee.

Viscount Reading, C. J. and Ridley, J. also held that the lessee could not give evidence of a custom that the lessor should provide the lessee with materials necessary for proper repair, because if such evidence was admitted and established as a fact it would be inconsistent with the terms of the lease. Lord Coleridge, J. did not express any opinion on this point.

Green *v.* **All Motors, Ltd.** : (1917) 1 K. B. 625 C. A.

Hire-purchase agreement—Hirer's right to keep chattel in repair—Repairer's right to lien as against owner for cost of repairs—Case of express provision in agreement for repair—Effect—Owner's right to have chattel on paying cost of repairs executed till date of his demand.

The hirer of a chattel is, even without an express authority from the owner, entitled to have it repaired so as to enable him to use it in the way in which such a chattel is ordinarily used. And where the hire-purchase agreement imposes upon the hirer the express duty of keeping the chattel in repair, he has a duty as well as a right, until the hire is terminated, to have the chattel

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repaired, with the ordinary consequences of giving the repairer a lien on the chattel for the proper cost of repairs. Where in a case in which the agreement imposed upon the hirer of a motor-car the duty of keeping it in good repair and working condition, the car was injured by an accident during the currency of the agreement and was sent for repair to persons, who knew that it was held under a hire-purchase agreement, and, before the termination of the agreement by the owner, the repairers had commenced the repairs, *held* that they were entitled to a lien on the car for the cost of the repairs and were justified in refusing to deliver it to the owner except on being paid the same.

Per Scrutton, L. J. :—*Quære*, whether if the owner had told the repairers before the repairs were completed not to do any more repairs and had tendered to them the sum due for the work done, the latter could have claimed a lien for the contract price of the repairs as distinguished from the cost of the work actually done. *Lilly* v. *Bransley*, (1844) 1 Car. and K. 344, referred to.

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Rex *v.* **Hammersmith, Superintendent and Registrar of Marriages; Mir Anvaruddin, Ex-parte** : (1917) 1 K. B. 634 C.A.

Marriage—Dissolution—Mode of—Mixed marriage in England according to English form between Mahomedan domiciled in India and English woman—Status conferred upon wife—Dissolution of marriage by husband pronouncing Talak—Validity—Decree in India dissolving marriage by virtue of husband having pronounced Talak if will be recognised by English Courts—Mahomedan Law—Marriage—Dissolution by pronouncing Talak—Applicability of rule to other than Mahomedan marriage.

When a foreigner domiciled abroad marries in England an English woman according to the forms prescribed by the English Law, she acquires the position of a wife, as known to the English Law unless there is anything to show that he or she intended that the ceremony should confer upon her anything other than that status.

Where a Mahomedan domiciled in India marries an English woman in England according to the forms prescribed by English Law, he cannot dissolve such marriage by handing to her a "writing of divorcement."

Per Bankes, L. J. and Viscount Reading, C. J. :—The rule of Mahomedan Law which entitles a Mahomedan husband to dissolve his marriage by pronouncing Talak is inapplicable to the case of a marriage by him with a woman in the Christian form.

Per Viscount Reading, C. J. and Bray, J.:—*Quære*, whether, if, according to the Law of India, a decree dissolving the marriage had been made by a Court of competent jurisdiction, such a decree founded on the husband's right to pronounce Talak would be recognised by English Courts as an effective divorce according to English Law.

JOTTINGS AND CUTTINGS.

Lawyers as State Leaders :—The large part which lawyers are playing in the war does not, amid all the ministerial changes of the different Allies, grow less notable. M. Ribot, the new French Premier, has been a member of the French Bar for more than half a century, and has proved his interest in the English Bar by writing a biography of one of the most distinguished of its members. His 'Life of Lord Erskine' is one of the best biographies of an English Lawyer that has ever been written by an author who was not himself an Englishman. Whenever the United States take up arms against Germany the influence of lawyers in the great struggle for the restoration and maintenance of law and justice will be greater still. Not only is the President of the United States a lawyer; no fewer than seven of the ten members of his Cabinet belong to the same profession. Mr. Lansing (Secretary of State), Mr. McAdoo (Secretary of the Treasury), Mr. Baker (Secretary of War), Mr. Gregory (Attorney-General), Mr. Burleson (Postmaster-General), Mr. Daniels (Secretary of the Navy), and Mr. Lane (Secretary of the Interior)—to name them in the order of precedence in America—have all been practising lawyers. It is particularly interesting to notice that the American Navy, like the British, is in charge of a lawyer, and that the War Office, as in England until Mr. Lloyd George became Prime Minister, has also a lawyer at the head of it.—*Law Journal, March* 31.

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Mr. Justice Darling :—The Ealing Schoolboy Harbert, who figured in the Courts last week as the 'bad boy' in a case

before Mr. Justice Darling, rounded off his adventures at the conclusion of the case (says the *Observer*) by running after the Judge with his autograph album. He was rewarded by securing this couplet over his Lordship's initials :—

'Walk with more care the scientific road,
Now warned that acids heated will explode.'

C. J. D.

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Ibid.

Women and the Law:—An Irish Judge, in deciding the other day that a woman is not eligible to hold the office of clerk of Petty Sessions, based his judgment upon considerations which deserve to be weighed carefully in connection with the proposed admission of women to the legal profession in England. The lady in question, who had discharged the duties of the office whilst her father was ill, had been duly elected by the justices, but the Crown in challenging the validity of her appointment, urged, as one reason why a woman ought not to occupy the office, that it 'might become her duty to take depositions in criminal cases, which would be unpleasant for her and for everybody concerned'. This contention was accepted and emphasised by Mr. Justice Barton, who observed that the disqualification of women for such an office rested, not 'upon any presumed inferiority of intellect or discretion,' but 'upon considerations of decorum and upon the unfitness of certain painful and exacting duties in relation to the finer qualities of women'. This is really the practical point in the whole controversy as to the admission of women as lawyers. With the larger question of women suffrage, it has no connection. The vital question, both from the public and the professional point of view, is whether the admission of women to the legal profession would interfere with the administration of the law. We, for our part, believe that it would. There are certain classes of cases in the Divorce and Criminal courts which no advocate could conduct with freedom if his opponent belonged to the other sex, and these are precisely the cases which some of the women who are clamouring for admission to the profession would regard as peculiarly fitted to their powers. Judges and juries, as well as counsel and solicitors, would be hampered by their presence, and the interests of justice would inevitably suffer by reason of this unwonted feeling of restraint. This is a practical objection which does not appear to have presented itself to the mind of Judge Parry, who is pleased to say

in the *Fortnightly Review* in his usual picturesque way; 'The only possible objection to women joining the ranks of the Bar or the solicitors is the selfish, animal, trade-union fear that there is only so much soup to go round, and that any further competition would result in hunger and possible starvation of existing members.' The difficulty would arise even if women were admitted to only one branch of the profession. Solicitors have a right of audience in County Courts and in all Courts of summary jurisdiction, and women, if admitted as solicitors, would thus be free to appear as advocates before the most numerous tribunals in the country:—*Law Journal, April 28, 1917.*

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Rex v. *Halliday*:—All lovers of the Constitution will regret the sinister judgment of the House of Lords in this test case, in which an extreme exercise of the powers of the Crown under the Defence of the Realm Acts was called in question. The matter at issue was nothing less than the supersession of the Great Charter itself by one of the now innumerable Regulations made on the mere motion of the Executive under the emergency legislation. Parliament had the power to do that, of course—it is omnipotent, but did it intend it? When, on the outbreak of the present hostilities, it passed in declaratory form the statutory provision, 'His Majesty in Council has power during the continuance of the present war to issue regulations for securing the public safety and the defence of the Realm', did it really mean to surrender all the safeguards for personal liberty which in times not less perilous have been won by and for the whole people; or to authorise the imprisonment of any subject for an indefinite period on the mere order of a Secretary of State? These were some of the vital questions which the judges had to determine when they applied themselves to the interpretation of the will of Parliament. And there were others which went to the root of their own functions in the state. Was it within the prerogative of the King as declared by this Statute, or within the intentions of Paliament, to set aside altogether the Rule of Law which has hitherto been the sure shield of every British liberty, to oust the jurisdiction of the Courts, to set up committees of Public Safety, proceeding in secret and condemning without appeal, to authorise imprisonment without trial for no offence charged, or

rather because there has been no offence? All these questions the judges have decided against themselves. Their abandonment of legal control over the arbitrary action of the Executive is fraught with danger to the Commonweal, and bodes ill for the integrity of our whole fabric of justice.

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Lord Shaw's Dissenting Judgment:—With the exception of the leading judgment of the Lord Chancellor, all the 'speeches' of the majority in the Lords were of a more or less perfunctory character, but the proceedings were redeemed by the masterly dissenting judgment of Lord Shaw of Dunfermline which we have the privilege of producing *in extenso* in another part of this issue. This historic pronouncement will live as an ornament in legal literature and a virile defence of judicial independence long after the present evil times have passed, and it is to be hoped that even now it may not be ineffective to rouse public attention to the dangers of the situation. The prejudice imported into the case by the introduction of the topic of 'hostile origin or associations'—the sole 'offence' of the unfortunate appellant—was swept away by the learned lord at the outset by a reference to 'the essential part underlying naturalisation'; on the one hand submission to our laws, on the other the fullest right to their protection. But he went much further than that when after quoting Maitland's memorable words on the operations of the Star Chamber—'It was a court of politicians enforcing a policy not a court of judges administering the law'—he observed that *there* was the basic danger, and that that danger exists in an especial degree whenever the law is not the same for all, but the selection of the victim is left to the plenary discretion whether of a tyrant, a committee, a bureaucracy, or any other depositary of despositic power. 'Whoever administers it, this power of selection of a class and power of selection within a class is the negative of public safety or defence. It is poison to the commonwealth'. The danger is indeed one which affects all the lieges, and already large numbers of British-born citizens have been imprisoned under the arbitrary powers conferred by the impugned Regulation. The system of *letters de cachet* has been established in our home of freedom, and the protection of the Courts against any abuse of it is now denied to all the king's subjects.—*Law Journal, May 5.*

Parliament and Civil Liberties.—No part of Lord Shaw's judgment was more valuable than his searching investigation of the lengths to which discrimination by 'Regulation' may go. If, said he, there is a power for a Secretary of State to lock up a person of hostile origin or associations—without trial or chance of trial; by force and not by process of law—because some department or official judges that course to be for public safety, why, on the same principle and in exercise of the same power, may he not be shot out of hand? The victim may be 'regulated' out of his life just as well as out of his liberty, to the scaffold just as easily as to prison. The Attorney-General did not shrink from claiming that power for the Executive. Once an uncontrolled discretion over all things and persons and rights and liberties, so as to secure public safety and defence, was conceded to the Government of the day, what Regulations might they not issue? The one under discussion was founded on 'hostile origin or associations'. It entered the sphere of suspicion, founded not on conduct, but on presumed opinions. 'This,' said Lord Shaw, 'is dangerous country; it has its dark reminders. It is the proscription, the arrest of suspects, at the will of men in power vested with a plenary discretion......Vested with this power of proscription, and permitted to enter the sphere of opinion and belief, they who alone can judge as to public safety and defence may reckon a political creed their special care; and if that creed be socialism, pacifism, or republicanism, the persons holding such creeds may be regulated out of the way, although never deed was done or word uttered by them that could be charged as a crime.' Parliament would not permit it? The assumption throughout is that Parliament has permitted it, not by word, but by necessary implication; and the Courts have adjudged that all these monstrous results may follow, without judicial check or interference. Blackstone had a better appreciation of the functions of the judiciary and the practice of the constitution when, in dealing with the securities against repeal of the Habeas Corpus Act, he treats the cases of liberty and life as tests equally of one and the same principle—the very principle which was under scrutiny in the present case:—'To bereave a man of life, or by violence to confiscate his estate, without accusation or trial, would be so gross and notorious an act of despotism as must at

once convey the alarm of tyranny throughout the whole kingdom but confinement of the person by secretly hurrying him to goal, where his sufferings are unknown or forgotten, is a less public, a less striking, and therefore a more dangerous form of arbitrary government.' The opinion of the great Commentator still holds the field, and beside it may well be set this powerful judgment of Lord Shaw of Dunfermline, which will stand as a very armoury of arguments when Parliament itself turns its attention, as it needs soon must, to the subject.—*Law Journal, May 5, 1917.*

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Departments as Litigants:—A curious light is thrown on the working of some of our emergency machinery by the proceedings in *British Petroleum Co.* v. *Brighton Aerodrome (Lim.)* which came on for trial before Mr. Justice Rowlatt last Tuesday. It appeared that the Plaintiff Company, being substantially an enemy concern, had been taken over by a controller appointed by the Board of Trade, and that the management was now in the hands of Directors appointed at the instance of the Board to act in the interests of the Government. These Directors acting in the name of the Plaintiff Company, now sought to enforce a claim for petrol supplied to the Defendant Company, whose concern had also been taken over, for other reasons, by another department, the War Office; and it transpired that the whole of the assets of the defendants had been requisitioned by the War Office, which had not yet paid the compensation due. This, of course, was no defence to the plaintiffs' claim, and the attempt of the defendants to put off judgment by a plea of 'alien enemy' necessarily failed as soon as it was shown that the actual plaintiffs were nominees of the Board of Trade. It was really a case of one Department trying to enforce its claim against another. 'The Government,' said Mr. Justice Rowlatt, 'through one department took everything that belonged to the defendants and had not yet paid for what they had taken, and through another department they brought an action against the defenceless company.' The learned judge gave the Board of Trade Directors their judgment, but he indicated his disapproval of the muddled condition of things which had brought about this result of depriving the plaintiffs of costs. Thus each of the conflicting parties will have to bear its own expenses of the litigation—not that anybody will be a whit the better for that, though perhaps the lesson may bear fruit

when some other department is thinking of starting proceeding against people sitting across the road in another Government office :—*Law Journal, May 12.*

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Judges and their Love of the Law :—Why is it that so many judges have remained on the Bench long after they have earned the right to retire? At the present time there are four supreme Court Judges who have served for more than fifteen years, and six Country Court Judges who have been on the Bench over a quarter of a century. One reason, perhaps, for this attachment to judicial work is that it is very interesting. 'The law dry? I deny it,' exclaimed Baron Bramwell. 'Of the four volumes of Blackstone's "commentaries," three, to my mind, are most interesting.' Many other famous judges have left on record their love of the law. The late Lord Coleridge was an exception. The letters he addressed to an American friend, which were published not long ago under the title of 'Forty Years of Friendship,' make it plain that he never possessed a liking for his profession. He goes, indeed, the length of saying that, while his work as an Advocate was barely interesting, his work as a Judge was positively repulsive. Lord Bowen, great lawyer as he was, held a somewhat similar view. 'I simply hate law,' he once observed to an intimate friend, adding, however, with characteristic wisdom, 'a man may be a fool to choose a profession, but he must be an idiot to give it up.' But Lord Coleridge and Lord Bowen had strong literary inclinations, and probably their dislike of the law was born of their love of literature. The great majority of judges have possessed a strong love of their profession, some even for the technical part of the law. It is reported, for instance, that Lord Wensleydale once apologised for his late arrival at a dinner party by informing his hostess that he could not tear himself away from a 'beautiful demurrer'. Others have found a fascination in the more human problems with which their judicial work has brought them intimately into touch. Mr. Justice Patteson found so much pleasure in his work on the Bench that he was afraid that he might continue it after his increasing deafness made it expedient in the public interest that he should retire, and he exacted a promise from a friend—which was faithfully fulfilled—that he would tell him immediately he thought his impaired power of hearing unfitted him for his work. Are there,

we wonder, any veterans on the Bench in these days, whether in the Supreme Court or the County Courts, who have entrusted such a mentor with the delicate task of determining their length of service?—*The Law Journal, May 12, 1917.*

CONTEMPORARY LEGAL LITERATURE.

In the *Law Quarterly Review* for April, Sir Frederick Pollock contrasts the German doctrine of State with the hitherto prevalent view of the State. According to the allies and that is the view which has long prevailed and was laid down by Lord Stowell as early as 1817, the perfect equality and entire independence of all distinct States is the fundamental principle of public law and relative magnitude creates no distinction of right. The new German doctrine of the State claims, for whatever State feels strong enough to defy hostile opinion, not the standing of an equal but the domination of a conqueror. Strong powers have no duties to weaker ones beyond such as they may themselves be pleased to declare and the weaker ones are bound to ally themselves as satellites with some of the stronger on pain of extinction. It is commonly said by writers of constitutional law that a colonial legislature unlike the Parliament of the United Kingdom, has no power to make laws having extra-territorial validity and operation and therefore that a colonial statute is invalid so far as it purports to prohibit as criminal offences acts done outside the limits of the colony or so far as it purports to authorise the doing of acts outside those limits which would otherwise be unlawful. This rule is commonly regarded as established by *Macleod's Case* (1891) A. C. 458. Discussing this matter by reference to other and later cases Professor Salmond suggests that notwithstanding Macleod's case there is no genuine rule of substantive constitutional law which prevents a colonial legislature from enacting such extra-territorial prohibitions or authorisations as may be required for the peace, order and good government of the Colony and are not repugnant to the enactments of the Imperial Parliament. The true restriction is one imposed by rules of interpretation which by reference to the presumed intention of the legislature will, notwithstanding the use of general words capable of extra-territorial application, cut out all such applications except where necessitated by the express words of the legislature or by

necessary implication and which even where extra-territorial application is clearly intended, will restrict that application to its appropriate subject-matter in such manner as to harmonise colonial legislation with the principles of international law and with the requirements of an orderly division of jurisdiction and authority between the competent self-governing portions of the Empire. Mr. Frederick Edward Farrer displays much antiquarian learning on the subject of bastard Eignè, i.e., a child born of parents not married at the time of the birth of the child but subsequently married. He strives to establish the proposition that if the bastard comes peacefully into possession and is not disturbed during his life-time, he is treated exactly like a legitimate child for all purposes of inheritance. Mr. Atulchandra Gupta enters a vigorous protest against the method of modern jurisprudence of treating law apart from all ethical and sociological phenomena. Nothing is more fallacious as a writer says, than to believe that one may give an account of the law by means of the law itself. In reality law is only a resultant. Its explanation is outside itself. Its sources must be sought elsewhere. Mr. Georgeo Del Vecchio, an Italian writer enunciates a new theory of natural law or the rule which affords the criterion and the rule of all social relations. This is arrived at by conceiving of man as living in a suprasensible universe and attaining by his consciousness of an absolute being the reason of his deliberations. This, Professor Randall in another article in the same journal shows is not the sense in which the mediaeval writers understood the term law of nature and generally exposes its utter uselessness in the solution of practical questions. For instance are freedom of contract, the duty of "keeping of covenant," private property, part of the law of nature ?. One may readily answer yes but yet it will be found that these principles are relative and not absolute at all and have had varying degrees of recognition.

In the University of Pennsylvania Law Review, a writer says that compensation for workmen's injuries should ordinarily be limited to injuries by accident and to some diseases which are more or less established to be the result of certain industries. On the continent, it is generally confined to injuries by accident. In Switzerland, it is given in addition, in the case of diseases which are proved to be the result of certain specified poisonous substances used

in the industrial process. In England, certain specified diseases are declared to be industrial diseases for which compensation is given. Control of property by the dead is another article of interest. In that article, the writer considers the conditions and limitations to which testamentary power is subject under the American law. In England though at one time, there were certain restrictions on the disposition of immoveable property, and the preferential claims of certain relatives such as of the wife to dower, and of the husband to curtesy were recognised, the rule at present obtaining is one of free disposition. Nevertheless there are other restrictions imposed on grounds of public policy. Certain restrictions have been imposed on dispositions in favour of charity. Certain purposes are regarded as charitable, others not dispositions. Only certain kinds of estate can be created and the control cannot last beyond a certain number of years or a certain number of lives and so forth. In America, rights of the husband and wife, and of minor children are recognised in many jurisdictions and in some others there is a rule that the right of the wife or the husband should be expressly excluded. Another writer gives an analysis of the Danish Code which is the latest systematic attempt to establish a form of procedure both civil and criminal built upon modern principles and with the avowed object of doing justice without interfering more than absolutely necessary with the individual freedom of man. In Denmark there are one Supreme Court, two superior Courts and 89 Courts of the 1st instance. The supreme Court consists of a President and twelve associate Judges. Each case is heard by 9 Judges. The Eastern Superior Court has a President and 17 Judges, the Western a President and 12 judges and 3 must hear a case. Besides these there is the Admiralty and Commerce Courts. The Courts of the first instance have ordinarily only one Judge. All the civil judges of the courts of the first instance are recorders of deeds. The judges have to be graduates of law, and must have passed *cum laude* or better. The lawyers are not authorised by the courts to practice but are appointed by the Minister of justice and can demand such appointment on proof of certain qualifications. The court has no disciplinary jurisdiction except that of fining for contempt of court. The attorneys and judges are independent of each other and sit on the same level. All lawyers *ipso facto* become members of a corporation with a President and a Board who have disciplinary jurisdiction. Lawyers have to be graduates. Those appointed to

practise before the Supreme Court are to be graduates of law *cum laude* or better, those appointed to the superior courts must be at at least graduates of law, first class., those appointed to the lower Courts at least graduates of the second class. They have to undergo an apprenticeship course. The higher Courts can fine lower Courts for undue delay in the disposal of cases. Judges can't be removed before 70 except on conviction. Parties can join all claims however arising against the same party and in all except a few specified cases (bills of exchange being one such) conciliation or amicable settlement is to be tried. Framing of issues is unknown and there are no rules of evidence. Parties are interrogated as to their case, and evidence is let in only as regards disputed points. Oath is administered at the end of a witness's examination and he may correct his statements and then swear. The Court may refuse to administer oath to a party on account of his character, or connection with or interest in the case. A party can appear himself but if he makes his right a device to practise law, he can be fined.

In the *American Law Review* for March-April, 1916 there is a discussion as to how far *future mental suffering is or should be an element of damages.* Some American Courts have allowed damages to the husband for the mental suffering caused to him by the fact of his wife's mutilation or disfigurement. The writer thinks that recovery must be allowed only in cases where the mental anguish is connected with the bodily injury is a proximate result of the torturous act and only to the person disfigured or mained.

Another writer puts the curious question—do our (American) laws protect criminals and seems inclined to answer yes and suggests certain reforms in criminal procedure to avoid the charge. He pleads for larger power of direction to the Judge, joint indictments, simplified charges, less interference by newspapers, and non-reversal for harmless technical errors.

In the *Canadian Law Times* for March, Mr. Justice Cameron gives a brief history of codification in different countries of the world and seems to think that in matters of private law where the rights of individuals in relation to each other are to be dealt with, it is much better to leave to the Courts to deal

with new situations as they arise than to attempt to anticipate them. The case is different as regards criminal law, projects of social regeneration or public law relating to Government or to administration.

In the Minnesota *Law Review* for February, an article deals with the advantages of the Court of conciliation by special reference to their history. It is an attempt by means of a special officer to bring out amicable settlement before parties actually go to trial. The experiment comes from the continent and so far as has been tried has been found successful in America. This and the Court of petty cases are among the expedients to bring justice to parties without needless expense and delay.

A highly interesting discussion as to conflict of laws as to bills and notes runs through several parts of this Journal (January to May) and is still unfinished. In the April part of that Journal, Mr. C. D. Allen traces the growth of the doctrine of non-interference with belligerent and neutral mails during the war. No such immunity was admitted during the Napoleonic wars. In fact, it was formulated in its broadest form only at the second Hague conference. The United States of America has been the greatest champion of this immunity both in theory and in practice. In the May number of the same Review, Professor Edmund Morgan discusses the never ending topic of Consideration in the case of contracts, whether benefit to the promisor is consideration or whether detriment to the promisee alone is.

In the *Medico Legal Journal for December*, a Doctor discusses the necessity for birth control. Apparently the editor of the journal does not share the view of the writer. In the March issue, two writers seem to agree in thinking that legislative acts (the case under discussion being Narcotic drugs act) are of little use in curbing the tendency to use the drugs.

BOOK REVIEWS.

THE LAW OF LIMITATION *by Mr. K. J. Rustomji, Bar-at-Law, Second Edition, 1917—Butterworth and Co., Ltd., Calcutta. Rs. 16.*

It is just two years since the first edition of this book appeared and a second edition has so soon been called for. No better proof can be required of the appreciation which the learned work has obtained at the hands of the profession. Dr. Mitra's well-known work has not been properly brought up to date and Mr. Rustomji's book bids fair to take, if it has not already taken, its place. To enhance the utility of the book we would venture to suggest the desirability of having a nominal index of cases instead of the present reference index, even if it be found necessary or convenient to retain the present reference system in the body of the book. The earlier Limitation Acts of this country and the more important at least of the English Statutes of Limitation may be usefully printed as Appendices.

THE LAW OF UNDUE INFLUENCE *by Khan Bahadur Abdur Rahim, Published by the Law Printing House, Madras. Price Rs. 5.*

We are glad to announce another departure from the publication of mere annotations of enactments by the Law Printing House. The present volume by Khan Bahadur Abdur Rahim, Vakil, Resident's Court, Hyderabad, contains valuable information on the Law of Undue Influence and connected subjects. In addition to dealing with the general aspects of the subject in the first three chapters, the author has dealt with the subjects of special relationships, such as solicitor and client trustee and *cestui que* trust, guardian and ward etc., devoting a chapter to each of the subjects. The last chapter but one deals with the effect of delay, acquiescence and confirmation on contracts induced by undue influence and the last chapter deals with wills. We should only add one word about the treatment of the subjects; the author has divided each chapter into two portions, the first treating of the English Law, attention being drawn to the important passages in the leading judgments, and the second portion treating of the Indian Law with reference to cases decided by Indian Courts. We need hardly add that the Index is full and get up leaves nothing to be desired. We have every reason to believe that the volume under review will be a useful addition to a Lawyer's Library.

SANJIVA ROW'S CODE OF CIVIL PROCEDURE, 1908, *2nd Edition, Law Printing House, Madras.*

We are in receipt of the first volume of Sanjiva Row's Code of Civil Procedure, 1908, with the case law thereon thoroughly revised and brought up to date. We need not trouble our readers by repeating the many excellent qualities which have made the Lawyers' Companion series so attractive to the legal profession. The book under review deals with the sections of the Civil Procedure Code on the lines of the Lawyers' Companion volumes and it is expected that the next volume which will be published shortly will deal with the schedules.

In spite of authoritative books on the Civil Procedure Code like that the Messrs. Woodroffe and Amir Ali, the present edition is bound to maintain its place of usefulness with ever busy lawyer.

A CONSOLIDATED DIGEST OF THE CASES DECIDED BY THE CHIEF COURT OF MYSORE, 1878 TO 1916, *published under the authority of the Government of Mysore.*

We have great pleasure in announcing an official publication by the Government of Mysore of a digest of the Reports of Cases decided by the Chief Court. We understand that prior to this publication there was no Digest of Mysore Reports and there can be no doubt that this volume will supply a real and long-felt want to the Judges and members of the Legal profession in the State of Mysore. The book is printed in the Law Printing House, Madras and this adds very much to the attractiveness of the volume.

DIGEST OF CASES OF SIND LAW REPORTS, 1866 TO 1916 *by Motiram Manghanmal, Pleader, Hyderabad. Rs. 12.*

We are in receipt of a Digest of Sind Law Reports 1866 to 1916, divided into two parts the first dealing with Civil and the second with Criminal Cases. We hope the book will be useful to the Bench and the Bar through out the Province.

WORKMEN'S COMPENSATION ACTS—*A Corpus Juris Treatise by Donald J. Kiser.*

Workmen's Compensation Acts, in so far as the United States is concerned are of more recent date than the cyclopædia article on the topic of Master and Servant, the first State Act being passed two years after the publication of that article. Since, however, there has been a rapid adoption of the new principle. The subject not being one which could be dealt with by way of annotation to the article Master and Servant, a supplement is issued dealing comprehensively with the principles, history and of the decisions under the various Compensation Acts in America. The work is executed in the cyclopædia's best manner and will enable the reader to have full and up to date information on the subject.